986/84-1903

(Slip Opinion)

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SUPREME COURT OF THE UNITED STATES

Syllabus

POSADAS DE PUERTO RICO ASSOCIATES, DBA CONDADO HOLIDAY INN *v.* TOURISM COMPANY OF PUERTO RICO

APPEAL FROM THE SUPREME COURT OF PUERTO RICO

No. 84–1903. Argued April 28, 1986—Decided July 1, 1986

Puerto Rico's Games of Chance Act of 1948 (Act) legalizes certain forms of casino gambling in licensed places in order to promote the development of tourism, but also provides that "[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico." Implementing regulations prohibit the advertising of gambling parlors to the public in Puerto Rico but permit restricted advertising through publicity media outside Puerto Rico. Appellant, a partnership franchised to operate a casino in Puerto Rico, was fined by appellee, a public corporation authorized to administer the Act, for violating the advertising restrictions in the Act and the regulations. Appellant then filed suit against appellee in the Superior Court of Puerto Rico, seeking a declaratory judgment that the Act and regulations, both facially and as applied by appellee, impermissibly suppressed commercial speech in violation of the First Amendment and the equal protection and due process guarantees of the Federal Constitution. The court held that the advertising restrictions had been unconstitutionally applied to appellant's past conduct, but the court then adopted a narrowing construction of the Act and regulations, declaring that they prohibited local advertising addressed to inviting residents of Puerto Rico to visit casinos, but not certain local advertising addressed to tourists even though it might incidentally reach the attention of residents. The court then held that, based on its construction of the laws, the statute and regulations were facially constitutional. The Puerto Rico Supreme Court dismissed appellant's appeal on the ground that it "d[id] not present a substantial constitutional question."

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Syllabus

Held:

1. This Court has jurisdiction to review the Puerto Rico Supreme Court's decision pursuant to 28 U. S. C. § 1258(2), which authorizes an appeal to this Court from a decision of the Puerto Rico Supreme Court that is in favor of the validity of a Puerto Rico statute challenged as being repugnant to the Federal Constitution. Appellant's federal constitutional claims were adequately raised at every stage of the proceedings below, and under Puerto Rico law appellant had the right to appeal the Superior Court's decision to the Puerto Rico Supreme Court on the ground that the case involved or decided a substantial constitutional question under the Federal Constitution. Thus, the Puerto Rico Supreme Court's dismissal of the appeal for want of a substantial constitutional question constituted a decision on the merits in favor of the validity of the challenged statute and regulations. This Court's jurisdiction is not affected by appellant's late filing, under Puerto Rico's Rules of Civil Procedure, of its notice of appeal to the Puerto Rico Supreme Court, since that court has held the filing requirement to be nonjurisdictional, and its failure to dismiss on timeliness grounds must be viewed as a waiver of the requirement. Pp. 8–9.

2. In reviewing the facial constitutionality of the Act and regulations, this Court must abide by the narrowing constructions announced by the Superior Court and approved *sub silentio* by the Puerto Rico Supreme Court. This would be the rule in a case originating in one of the 50 States, and Puerto Rico's status as a Commonwealth dictates application of the same rule. Pp. 9–10.

3. The Act and regulations, as construed by the Superior Court, do not facially violate the First Amendment. The advertising restrictions pass muster under the four-prong test of *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n of New York*, 447 U. S. 557. First, the particular kind of commercial speech at issue concerns a lawful activity and is not misleading or fraudulent, at least in the abstract, and thus is entitled to a limited form of First Amendment protection. Second, Puerto Rico's interest in restricting advertisement to reduce the demand for casino gambling by Puerto Rico's residents and thus protect their health, safety, and welfare, constitutes a "substantial" governmental interest. Third, the restrictions on commercial speech "directly advance" the government's asserted interest, and are not underinclusive simply because other kinds of gambling may be advertised to Puerto Rico residents. And fourth, the restrictions are no more extensive than necessary to serve the government's interest since, as construed by the Superior Court, they do not affect advertising aimed at tourists, but apply only to advertising aimed at Puerto Rico residents. *Carey* v. *Population Services International*, 431 U. S. 678; and *Bigelow* v. *Virginia*, 421

Syllabus

U. S. 809, distinguished. There is no merit to appellant's argument that, having chosen to legalize casino gambling for Puerto Rico residents, the First Amendment prohibited the legislature from using restrictions on advertising to accomplish its goal of reducing demand for such gambling. Pp. 10–17.

4. The Puerto Rico Supreme Court properly concluded that, as construed by the Superior Court, the Act and regulations do not facially violate the due process or equal protection guarantees of the Constitution. Even assuming that appellant's argument that the advertising restrictions are unconstitutionally vague, in violation of due process requirements, has merit with respect to the bare statutory language, nevertheless this Court is bound by the Superior Court's narrowing construction of the statute. Viewed in that light, and particularly with the interpretive assistance of the regulations as modified by the Superior Court, the statute is not unconstitutionally vague. Pp. 17–18.

Affirmed.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BRENNAN and STEVENS, JJ., filed dissenting opinions, in which MARSHALL and BLACKMUN, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

No. 84–1903

POSADAS DE PUERTO RICO ASSOCIATES, DBA CONDADO HOLIDAY INN, APPELLANT *v.* TOURISM COMPANY OF PUERTO RICO

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

[July 1, 1986]

JUSTICE REHNQUIST delivered the opinion of the Court.

In this case we address the facial constitutionality of a Puerto Rico statute and regulations restricting advertising of casino gambling aimed at the residents of Puerto Rico. Appellant Posadas de Puerto Rico Associates, doing business in Puerto Rico as Condado Holiday Inn Hotel and Sands Casino, filed suit against appellee Tourism Company of Puerto Rico in the Superior Court of Puerto Rico, San Juan Section. Appellant sought a declaratory judgment that the statute and regulations, both facially and as applied by the Tourism Company, impermissibly suppressed commercial speech in violation of the First Amendment and the equal protection and due process guarantees of the United States Constitution.[1] The Superior Court held that the advertising restrictions had been unconstitutionally applied to appellant's past conduct. But the court adopted a narrowing construction of the statute and regulations and held that, based on such a construction,

[1] We have held that Puerto Rico is subject to the First Amendment Speech Clause, *Balzac* v. *Porto Rico*, 258 U. S. 298, 314 (1922), the Due Process Clause of either the Fifth or the Fourteenth Amendment, *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 668–669, n. 5 (1974), and the equal protection guarantee of either the Fifth or the Fourteenth Amendment, *Examining Board* v. *Flores de Otero*, 426 U. S. 572, 599–601 (1976). See generally *Torres* v. *Puerto Rico*, 442 U. S. 465, 468–471 (1979).

both were facially constitutional. The Supreme Court of Puerto Rico dismissed an appeal on the ground that it "d[id] not present a substantial constitutional question." We postponed consideration of the question of jurisdiction until the hearing on the merits. 474 U. S. —— (1985). We now hold that we have jurisdiction to hear the appeal, and we affirm the decision of the Supreme Court of Puerto Rico with respect to the facial constitutionality of the advertising restrictions.

In 1948, the Puerto Rico Legislature legalized certain forms of casino gambling. The Games of Chance Act of 1948, Act No. 221 of May 15, 1948 (Act), authorized the playing of roulette, dice, and card games in licensed "gambling rooms." § 2, codified, as amended, at P. R. Laws Ann., Tit. 15, § 71 (1972). Bingo and slot machines were later added to the list of authorized games of chance under the Act. See Act of June 7, 1948, No. 21, § 1 (bingo); Act of July 30, 1974, No. 2, Part 2, § 2 (slot machines). The legislature's intent was set forth in the Act's Statement of Motives:

> "The purpose of this Act is to contribute to the development of tourism by means of the authorization of certain games of chance which are customary in the recreation places of the great tourist centers of the world, and by the establishment of regulations for and the strict surveillance of said games by the government, in order to ensure for tourists the best possible safeguards, while at the same time opening for the Treasurer of Puerto Rico an additional source of income." Games of Chance Act of 1948, Act No. 221 of May 15, 1948, § 1.

The Act also provided that "[n]o gambling room shall be permitted to advertise or otherwise offer their facilities to the public of Puerto Rico." § 8, codified at P. R. Laws Ann., Tit. 15, § 77 (1972).

The Act authorized the Economic Development Administration of Puerto Rico to issue and enforce regulations implementing the various provisions of the Act. See § 7(a), codified as amended at P. R. Laws Ann., Tit. 15, § 76a (1972). Appellee Tourism Company of Puerto Rico, a public corporation, assumed the regulatory powers of the Economic Development Administration under the Act in 1970. See Act of June 18, 1970, No. 10, § 17, codified at P. R. Laws Ann., Tit. 23, § 671p (Supp. 1983). The two regulations at issue in this case were originally issued in 1957 for the purpose of implementing the advertising restrictions contained in § 8 of the Act. Regulation 76–218 basically reiterates the language of § 8. See 15 R. & R. P. R. § 76–218 (1972). Regulation 76a–1(7), as amended in 1971, provides in pertinent part:

> "No concessionaire, nor his agent or employee is authorized to advertise the gambling parlors to the public in Puerto Rico. The advertising of our games of chance is hereby authorized through newspapers, magazines, radio, television and other publicity media outside Puerto Rico subject to the prior editing and approval by the Tourism Development Company of the advertisement to be submitted in draft to the Company." 15 R. & R. P. R. § 76a–1(7) (1972).

In 1975, appellant Posadas de Puerto Rico Associates, a partnership organized under the laws of Texas, obtained a franchise to operate a gambling casino and began doing business under the name Condado Holiday Inn Hotel and Sands Casino.[2] In 1978, appellant was twice fined by the Tourism Company for violating the advertising restrictions in the Act and implementing regulations. Appellant protested the fines in a series of letters to the Tourism Company. On Feb-

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[2] The hotel was purchased in 1983 by Williams Electronics Corporation, is now organized as a public corporation under Delaware law as Posadas de Puerto Rico Associates, Inc., and does business in Puerto Rico as Condado Plaza Hotel and Casino.

ruary 16, 1979, the Tourism Company issued to all casino franchise holders a memorandum setting forth the following interpretation of the advertising restrictions:

> "This prohibition includes the use of the word 'casino' in matchbooks, lighters, envelopes, inter-office and/or external correspondence, invoices, napkins, brochures, menus, elevators, glasses, plates, lobbies, banners, flyers, paper holders, pencils, telephone books, directories, bulletin boards or in any hotel dependency or object which may be accessible to the public in Puerto Rico." App. 7a.

Pursuant to this administrative interpretation, the Tourism Company assessed additional fines against appellant. The Tourism Company ordered appellant to pay the outstanding total of $1,500 in fines by March 18, 1979, or its gambling franchise would not be renewed. Appellant continued to protest the fines, but ultimately paid them without seeking judicial review of the decision of the Tourism Company. In July 1981, appellant was again fined for violating the advertising restrictions. Faced with another threatened nonrenewal of its gambling franchise, appellant paid the $500 fine under protest.[3]

Appellant then filed a declaratory judgment action against the Tourism Company in the Superior Court of Puerto Rico, San Juan Section, seeking a declaration that the Act and implementing regulations, both facially and as applied by the Tourism Company, violated appellant's commercial speech rights under the United States Constitution. The Puerto Rico Secretary of Justice appeared for the purpose of defending the constitutionality of the statute and regulations. After a trial, the Superior Court held that "[t]he adminis-

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[3] News of the Tourism Company's decision to levy the fine against appellant reached the New Jersey Gaming Commission, and caused the Commission to consider denying a petition filed by appellant's parent company for a franchise to operate a casino in that State.

trative interpretation and application has been capricious, arbitrary, erroneous and unreasonable, and has produced absurd results which are contrary to law." The court therefore determined that it must "override the regulatory deficiency to save the constitutionality of the statute." The court reviewed the history of casino gambling in Puerto Rico and concluded:

> "We assume that the legislator was worried about the participation of the residents of Puerto Rico on what on that date constituted an experiment. . . . Therefore, he prohibited the gaming rooms from announcing themselves or offering themselves to the public—which we reasonably infer are the *bona fide* residents of Puerto Rico. . . . [W]hat the legislator foresaw and prohibited was the invitation to play at the casinos through publicity campaigns or advertising in Puerto Rico addressed to the resident of Puerto Rico. He wanted to protect him."

Based on this view of the legislature's intent, the court issued a narrowing construction of the statute, declaring that "the only advertisement prohibited by law originally is that which is contracted with an advertising agency, for consideration, to attract the resident to bet at the dice, card, roulette and bingo tables." The court also issued the following narrowing construction of Regulation 76a–1(7):

> "Advertisements of the casinos in Puerto Rico are prohibited in the local publicity media addressed to inviting the residents of Puerto Rico to visit the casinos.
>
> . . . . . .
>
> "We hereby allow, within the jurisdiction of Puerto Rico, advertising by the casinos addressed to tourists, provided they do not invite the residents of Puerto Rico to visit the casino, even though said announcements may incidentally reach the hands of a resident. Within the ads of casinos allowed by this regulation figure, for illus-

trative purposes only, advertising distributed or placed in landed airplanes or cruise ships in jurisdictional waters and in restricted areas to travelers only in the international airport and the docks where tourist cruise ships arrive since the principal objective of said announcements is to make the tourist in transit through Puerto Rico aware of the availability of the games of chance as a tourist amenity; the ads of casinos in magazines for distribution primarily in Puerto Rico to the tourist, including the official guide of the Tourism Company 'Que Pasa in Puerto Rico' and any other tourist facility guide in Puerto Rico, even though said magazines may be available to the residents and in movies, television, radio, newspapers and trade magazines which may be published, taped, or filmed in the exterior for tourism promotion in the exterior even though they may be exposed or incidentally circulated in Puerto Rico. For example: an advertisement in the New York Times, an advertisement in CBS which reaches us through Cable TV, whose main objective is to reach the potential tourist.

"We hereby authorize advertising in the mass communication media of the country, where the trade name of the hotel is used even though it may contain a reference to the casino provided that the word casino is never used alone nor specified. Among the announcements allowed, by way of illustration, are the use of the trade name with which the hotel is identified for the promotion of special vacation packages and activities at the hotel, in invitations, 'billboards,' bulletins and programs or activities sponsored by the hotel. The use of the trade name, including the reference to the casino is also allowed in the hotel's facade, provided the word 'casino' does not exceed in proportion the size of the rest of the name, and the utilization of lights and colors will be allowed if the rest of the laws regarding this application are complied with; and in the menus, napkins, glasses, tableware,

glassware and other items used within the hotel, as well as in calling cards, envelopes and letterheads of the hotel and any other use which constitutes a means of identification.

"The direct promotion of the casinos within the premises of the hotels is allowed. In-house guests and clients may receive any type of information and promotion regarding the location of the casino, its schedule and the procedure of the games as well as magazines, souvenirs, stirrers, matchboxes, cards, dice, chips, T-shirts, hats, photographs, postcards and similar items used by the tourism centers of the world.

"Since a *clausus* enumeration of this regulation is unforeseeable, any other situation or incident relating to the legal restriction must be measured in light of the public policy of promoting tourism. If the object of the advertisement is the tourist, it passes legal scrutiny."

The court entered judgment declaring that appellant's constitutional rights had been violated by the Tourism Company's past application of the advertising restrictions, but that the restrictions were not facially unconstitutional and could be sustained, as "modified by the guidelines issued by this Court on this date."[4]

The Supreme Court of Puerto Rico dismissed appellant's appeal of the Superior Court's decision on the ground that it "d[id] not present a substantial constitutional question." See P. R. Laws Ann., Tit. 4, § 37(a) (1978). Treating appellant's submission as a petition for a writ of review, see

[4] In addition to its decision concerning the advertising restrictions, the Superior Court declared unconstitutional a regulation, 15 R. & R. P. R. § 76a–4(e), that required male casino patrons to wear dinner jackets while in the casino. The court described the dinner jacket requirement as "basically a condition of sex" and found that the legislature "has no reasonable interest which would warrant a dissimilar classification" based on sex. See Juris. Statement 35b–36b.

§§ 37(b), (g), the Supreme Court denied the petition. One judge dissented.

We hold that we have jurisdiction to review the decision of the Supreme Court of Puerto Rico. A federal statute, 28 U. S. C. § 1258(2), specifically authorizes an appeal to this Court from a decision of the Supreme Court of Puerto Rico "where is drawn in question the validity of a statute of the Commonwealth of Puerto Rico on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity." A careful review of the record in this case reveals that appellant's federal constitutional claims were adequately raised at every stage of the proceedings below. In a letter to the Tourism Company on February 24, 1982, prior to filing suit, appellant warned that, absent a reinterpretation of the advertising restrictions by the Tourism Company, "we have no choice but to challenge in Court the constitutionality and or validity of the advertising prohibition of the Act and Regulations." App. to Juris. Statement 6h. In its complaint, appellant claimed that the advertising restrictions "violat[ed] the constitutional rights of petitioner protected by the First Amendment to the Constitution of the United States . . . the constitutional guarantee of equal protection of the laws protected by the Constitution of the United States . . . [and] the constitutional guarantee of due process of law . . . ." *Id.*, at 4i. And in the bill of appeal to the Supreme Court of Puerto Rico, appellant claimed that the advertising restrictions violated "the First Amendment of the United States Constitution," *id.*, at 5c, along with "due process of law guaranteed by the Constitution" and "the equal protection of the laws," *id.*, at 6c.

Under Puerto Rico law, appellant had the right to appeal the Superior Court's decision to the Supreme Court of Puerto Rico on the ground that that case "involv[ed] or decid[ed] a substantial constitutional question under the Constitution of the United States." P. R. Laws Ann., Tit. 4, § 37(a) (1978).

The Supreme Court's dismissal of appellant's appeal for want of "a substantial constitutional question" therefore constituted a decision on the merits in favor of the validity of the challenged statute and regulations. See *Tumey* v. *Ohio*, 273 U. S. 510, 515 (1927). In such a situation, we have jurisdiction to review the decision of the Supreme Court pursuant to 28 U. S. C. § 1258(2).

The Tourism Company argues, however, that appellant's notice of appeal was not timely filed with the Clerk of the Supreme Court of Puerto Rico,[5] in violation of Rule 53.1 of the Puerto Rico Rules of Civil Procedure. According to the Tourism Company, this flaw is fatal to appellant's right to seek review in this Court. We do not agree. The requirement under Rule 53.1 that a notice of appeal be timely filed with the clerk of the reviewing court has been held by the Supreme Court of Puerto Rico to be nonjurisdictional. See *Morales* v. *Mendez Mas*, 109 P. R. R. 1136 (1980). In this case, the Supreme Court did not dismiss appellant's appeal on timeliness grounds, so we can only assume that the court waived the timeliness requirement, as it had the power to do. Appellant's late filing of the notice of appeal does not affect our jurisdiction.

Before turning to the merits of appellant's First Amendment claim, we must address an additional preliminary matter. Although we have not heretofore squarely addressed the issue in the context of a case originating in Puerto Rico, we think it obvious that, in reviewing the facial constitutionality of the challenged statute and regulations, we must abide by the narrowing constructions announced by the Superior Court and approved *sub silentio* by the Supreme Court of

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[5] Under Puerto Rico law, the notice of appeal apparently was due in the Clerk's Office by 5 p.m. on the 30th day following the docketing of the Superior Court's judgment. Supreme Court of Puerto Rico Rule 48(a). The certificate of the Acting Chief Clerk of the Supreme Court of Puerto Rico indicates that appellant's notice of appeal was filed at 5:06 p.m. on the 30th day.

Puerto Rico. This would certainly be the rule in a case originating in one of the 50 States. See *New York* v. *Ferber*, 458 U. S. 747, 769, n. 24 (1982); *Kingsley International Pictures Corp.* v. *Regents*, 360 U. S. 684, 688 (1959). And we believe that Puerto Rico's status as a Commonwealth dictates application of the same rule. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U. S. 663, 672–673 (1974) (noting with approval decisions of lower federal courts holding that Puerto Rico is to be deemed "sovereign over matters not ruled by the Constitution"); *Wackenhut Corp.* v. *Aponte*, 266 F. Supp. 401, 405 (1966) (Puerto Rico "should have the primary opportunity through its courts to determine the intended scope of its own legislation"), aff'd, 386 U. S. 268 (1967).[6]

Because this case involves the restriction of pure commercial speech which does "no more than propose a commercial transaction," *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748, 762 (1976),[7] our

[6] A rigid rule of deference to interpretations of Puerto Rico law by Puerto Rico courts is particularly appropriate given the unique cultural and legal history of Puerto Rico. See *Diaz* v. *Gonzalez*, 261 U. S. 102, 105–106 (1923) (Holmes, J.) ("This Court has stated many times the deference due to the understanding of the local courts upon matters of purely local concern. . . . This is especially true in dealing with the decisions of a Court inheriting and brought up in a different system from that which prevails here").

[7] The narrowing construction of the statute and regulations announced by the Superior Court effectively ensure that the advertising restrictions cannot be used to inhibit either the freedom of the press in Puerto Rico to report on any aspect of casino gambling, or the freedom of anyone, including casino owners, to comment publicly on such matters as legislation relating to casino gambling. See *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. ——, ——, n. 7 (1985) (noting that Ohio's ban on advertising of legal services in Dalkon Shield cases "has placed no general restrictions on appellant's right to publish facts or express opinions regarding Dalkon Shield litigation"); *Pittsburgh Press Co.* v. *Pittsburgh Comm'n on Human Relations*, 413 U. S. 376, 391 (1973) (emphasizing that "nothing in our holding allows government at any level to forbid Pittsburgh Press to publish and distribute advertisements commenting on the Ordinance, the enforce-

First Amendment analysis is guided by the general principles identified in *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 557 (1980). See *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. ——, —— (1985). Under *Central Hudson*, commercial speech receives a limited form of First Amendment protection so long as it concerns a lawful activity and is not misleading or fraudulent. Once it is determined that the First Amendment applies to the particular kind of commercial speech at issue, then the speech may be restricted only if the government's interest in doing so is substantial, the restrictions directly advance the government's asserted interest, and the restrictions are no more extensive than necessary to serve that interest. 447 U. S., at 566.

The particular kind of commercial speech at issue here, namely, advertising of casino gambling aimed at the residents of Puerto Rico, concerns a lawful activity and is not misleading or fraudulent, at least in the abstract. We must therefore proceed to the three remaining steps of the *Central Hudson* analysis in order to determine whether Puerto Rico's advertising restrictions run afoul of the First Amendment. The first of these three steps involves an assessment of the strength of the government's interest in restricting the speech. The interest at stake in this case, as determined by the Superior Court, is the reduction of demand for casino gambling by the residents of Puerto Rico. Appellant acknowledged the existence of this interest in its February 24, 1982, letter to the Tourism Company. See App. to Juris. Statement 2h ("The legislators wanted the tourists to flock to the casinos to gamble, but not our own people"). The Tourism Company's brief before this Court explains the legislature's belief that "[e]xcessive casino gambling among local

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ment practices of the Commission, or the propriety of sex preferences in employment"); Jackson & Jeffries, Commercial Speech: Economic Due Process and the First Amendment, 65 Va. L. Rev. 1, 35, n. 125 (1979) (such "'political' dialogue is at the core of . . . the first amendment").

residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime." Brief for Appellee 37. These are some of the very same concerns, of course, that have motivated the vast majority of the 50 States to prohibit casino gambling. We have no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a "substantial" governmental interest. Cf. *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. ——, —— (1986) (city has substantial interest in "preserving the quality of life in the community at large").

The last two steps of the *Central Hudson* analysis basically involve a consideration of the "fit" between the legislature's ends and the means chosen to accomplish those ends. Step three asks the question whether the challenged restrictions on commercial speech "directly advance" the government's asserted interest. In the instant case, the answer to this question is clearly "yes." The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view. See *Central Hudson*, *supra*, at 569 ("There is an immediate connection between advertising and demand for electricity. Central Hudson would not contest the advertising ban unless it believed that promotion would increase its sales"); cf. *Metromedia, Inc.* v. *City of San Diego*, 453 U. S. 490, 509 (1981) (plurality opinion of WHITE, J.) (finding third prong of *Central Hudson* test satisfied where legislative judgment "not manifestly unreasonable").

Appellant argues, however, that the challenged advertising restrictions are underinclusive because other kinds of gambling such as horse racing, cockfighting, and the lottery may be advertised to the residents of Puerto Rico. Appellant's argument is misplaced for two reasons. First, whether other kinds of gambling are advertised in Puerto Rico or not, the restrictions on advertising of casino gambling "directly advance" the legislature's interest in reducing demand for games of chance. See *id.*, at 511 (plurality opinion of WHITE, J.) ("[W]hether onsite advertising is permitted or not, the prohibition of offsite advertising is directly related to the stated objectives of traffic safety and esthetics. This is not altered by the fact that the ordinance is underinclusive because it permits onsite advertising"). Second, the legislature's interest, as previously identified, is not necessarily to reduce demand for all games of chance, but to reduce demand for casino gambling. According to the Superior Court, horse racing, cockfighting, "picas," or small games of chance at fiestas, and the lottery "have been traditionally part of the Puerto Rican's roots," so that "the legislator could have been more flexible than in authorizing more sophisticated games which are not so widely sponsored by the people." In other words, the legislature felt that for Puerto Ricans the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico.[8] In our view, the legislature's separate

[8] The history of legalized gambling in Puerto Rico supports the Superior Court's view of the legislature's intent. Casino gambling was prohibited in Puerto Rico for most of the first half of this century. See Puerto Rico Penal Code, § 299, Rev. Stats. and Codes of Porto Rico (1902). The Puerto Rico Penal Code of 1937 made it a misdemeanor to deal, play, carry on, open, or conduct "any game of faro, monte, roulette, fantan, poker, seven and a half, twenty one, hoky-poky, or any game of chance played with cards, dice or any device for money, checks, credit, or other representative of value." See P. R. Laws Ann., Tit. 33, § 1241 (1983). This longstanding prohibition of casino gambling stood in stark contrast to the Puerto Rico Legislature's early legalization of horse racing, see Act of Mar.

classification of casino gambling, for purposes of the advertising ban, satisfies the third step of the *Central Hudson* analysis.

We also think it clear beyond peradventure that the challenged statute and regulations satisfy the fourth and last step of the *Central Hudson* analysis, namely, whether the restrictions on commercial speech are no more extensive than necessary to serve the government's interest. The narrowing constructions of the advertising restrictions announced by the Superior Court ensure that the restrictions will not affect advertising of casino gambling aimed at tourists, but will apply only to such advertising when aimed at the residents of Puerto Rico. See also n. 7, *infra*; cf. *Oklahoma Telecasters Assn.* v. *Crisp*, 699 F. 2d 490, 501 (CA10 1983), rev'd on other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691 (1984). Appellant contends, however, that the First Amendment requires the Puerto Rico Legislature to reduce demand for casino gambling among the residents of Puerto Rico not by suppressing commercial speech that might *encourage* such gambling, but by promulgating additional speech designed to *discourage* it. We reject this contention. We think it is up to the legislature to decide whether or not such a "counterspeech" policy would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would never-

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10, 1910, No. 23, repealed, Act of April 13, 1916, No. 28, see P. R. Laws Ann., Tit. 15, §§ 181–197 (1972 & Supp. 1985); "picas," see Act of April 23, 1927, No. 25, § 1, codified, as amended, at P. R. Laws Ann., Tit. 15, § 80 (1972); dog racing, see Act of April 20, 1936, No. 35, repealed, Act of June 4, 1957, No. 10, § 1, see P. R. Laws Ann., Tit. 15, § 231 (1972); cockfighting, see Act of Aug. 12, 1933, No. 1, repealed, Act of May 12, 1942, No. 236, see P. R. Laws Ann., Tit. 15, §§ 281–299 (1972 & Supp. 1985); and the Puerto Rico lottery, see J. R. No. 37, May 12, 1934, repealed, Act of May 15, 1938, No. 212, see P. R. Laws Ann., Tit. 15, §§ 111–128 (1972 & Supp. 1985).

theless be induced by widespread advertising to engage in such potentially harmful conduct. Cf. *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582, 585 (DC 1971) (three-judge court) ("Congress had convincing evidence that the Labeling Act of 1965 had not materially reduced the incidence of smoking"), aff'd, 405 U. S. 1000 (1972); *Dunagin* v. *City of Oxford, Miss.*, 718 F. 2d 738, 751 (CA5 1983) (en banc) ("We do not believe that a less restrictive time, place and manner restriction, such as a disclaimer warning of the dangers of alcohol, would be effective. The state's concern is not that the public is unaware of the dangers of alcohol. . . . The concern instead is that advertising will unduly promote alcohol consumption despite known dangers"), cert. denied, 467 U. S. 1259 (1984).

In short, we conclude that the statute and regulations at issue in this case, as construed by the Superior Court, pass muster under each prong of the *Central Hudson* test. We therefore hold that the Supreme Court of Puerto Rico properly rejected appellant's First Amendment claim.[9]

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[9] It should be apparent from our discussion of the First Amendment issue, and particularly the third and fourth prongs of the *Central Hudson* test, that appellant can fare no better under the equal protection guarantee of the Constitution. Cf. *Renton* v. *Playtime Theatres, Inc.*, 475 U. S. ——, —— (1986). If there is a sufficient "fit" between the legislature's means and ends to satisfy the concerns of the First Amendment, the same "fit" is surely adequate under the applicable "rational basis" equal protection analysis. See *Dunagin* v. *City of Oxford, Miss.*, 718 F. 2d 738, 752–753 (CA5 1983) (en banc), cert. denied, 467 U. S. 1259 (1984).

JUSTICE STEVENS, in dissent, asserts the additional equal protection claim, not raised by appellant either below or in this Court, that the Puerto Rico statute and regulations impermissibly discriminate between different kinds of publications. *Post*, at 1–2. JUSTICE STEVENS misunderstands the nature of the Superior Court's limiting construction of the statute and regulations. According to the Superior Court, "[i]f the object of [an] advertisement is the tourist, it passes legal scrutiny." See Juris. Statement 40b. It is clear from the court's opinion that this basic test applies *regardless of whether the advertisement appears in a local or non-local publication.* Of course, the likelihood that a casino advertisement appearing in the New York Times will be primarily addressed to tourists, and not Puerto Rico residents, is far greater than would be the case for a similar

Appellant argues, however, that the challenged advertising restrictions are constitutionally defective under our decisions in *Carey* v. *Population Services Int'l*, 431 U. S. 678 (1977), and *Bigelow* v. *Virginia*, 421 U. S. 809 (1975). In *Carey*, this Court struck down a ban on any "advertisement or display" of contraceptives, 431 U. S., at 700–702, and in *Bigelow*, we reversed a criminal conviction based on the advertisement of an abortion clinic. We think appellant's argument ignores a crucial distinction between the *Carey* and *Bigelow* decisions and the instant case. In *Carey* and *Bigelow*, the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and *Carey* and *Bigelow* are hence inapposite.

Appellant also makes the related argument that, having chosen to legalize casino gambling for residents of Puerto Rico, the First Amendment prohibits the legislature from using restrictions on advertising to accomplish its goal of reducing demand for such gambling. We disagree. In our view, appellant has the argument backwards. As we noted in the preceding paragraph, it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising. It would surely be a Pyrrhic victory for casino owners such as appellant to gain recognition of a First Amendment right to

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advertisement appearing in the San Juan Star. But it is simply the demographics of the two newspapers' readerships, and not any form of "discrimination" on the part of the Puerto Rico Legislature or the Superior Court, which produces this result.

advertise their casinos to the residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether. It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand. Legislative regulation of products or activities deemed harmful, such as cigarettes, alcoholic beverages, and prostitution, has varied from outright prohibition on the one hand, see, *e. g.*, Cal. Penal Code Ann. § 647(b) (West Supp. 1986) (prohibiting soliciting or engaging in act of prostitution), to legalization of the product or activity with restrictions on stimulation of its demand on the other hand, see, *e. g.*, Nev. Rev. Stat. §§ 244.345(1), (8) (1986) (authorizing licensing of houses of prostitution except in counties with more than 250,000 population), §§ 201.430, 201.440 (prohibiting advertising of houses of prostitution "[i]n any public theater, on the public streets of any city or town, or on any public highway," or "in [a] place of business").[10] To rule out the latter,

[10] See also 15 U. S. C. § 1335 (prohibiting cigarette advertising "on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission"), upheld in *Capital Broadcasting Co.* v. *Mitchell*, 333 F. Supp. 582 (1971), aff'd, 405 U. S. 1000 (1972); Fla. Stat. § 561.42(10)–(12) (1985) (prohibiting all signs except for one sign per product in liquor store windows); Mass. Gen. Laws ch. 138, § 24 (1974) (authorizing Alcoholic Beverages Control Commission to regulate liquor advertising); Miss. Code Ann. § 67–1–85 (Supp. 1985) (prohibiting most forms of liquor sign advertising), upheld in *Dunagin* v. *City of Oxford, Miss.*, *supra;* Ohio Rev. Code Ann. §§ 4301.03(E), 4301.211 (1982) (authorizing Liquor Control Commission to regulate liquor advertising and prohibiting off-premises advertising of beer prices), upheld in *Queensgate Investment Co.* v. *Liquor Control Comm'n*, 69 Ohio St. 2d 361, 433 N. E. 2d 138, appeal dismissed for want of a substantial federal question, 459 U. S. 807 (1982); Okla. Const. Art. 27, § 5, and Okla. Stat., Tit. 37, § 516 (1981) (prohibiting all liquor advertising except for one storefront sign), upheld in *Oklahoma Telecasters Assn.* v. *Crisp*, 699 F. 2d 490 (CA10 1983), rev'd on

intermediate kind of response would require more than we find in the First Amendment.

Appellant's final argument in opposition to the advertising restrictions is that they are unconstitutionally vague. In particular, appellant argues that the statutory language, "to advertise or otherwise offer their facilities," and "the public of Puerto Rico," are not sufficiently defined to satisfy the requirements of due process. Appellant also claims that the term "anunciarse," which appears in the controlling Spanish version of the statute, is actually broader than the English term "to advertise," and could be construed to mean simply "to make known." Even assuming that appellant's argument has merit with respect to the bare statutory language, however, we have already noted that we are bound by the Superior Court's narrowing construction of the statute. Viewed in light of that construction, and particularly with the interpretive assistance of the implementing regulations as modified by the Superior Court, we do not find the statute unconstitutionally vague.

For the foregoing reasons, the decision of the Supreme Court of Puerto Rico that, as construed by the Superior Court, § 8 of the Games of Chance Act of 1948 and the implementing regulations do not facially violate the First Amendment or the due process or equal protection guarantees of the Constitution, is affirmed.[11]

It is so ordered.

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other grounds *sub nom. Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691 (1984); Utah Code Ann. § 32–7–26 to § 32–7–28 (1974) (repealed 1985) (prohibiting all liquor advertising except for one storefront sign).

[11] JUSTICE STEVENS claims that the Superior Court's narrowing construction creates an impermissible "prior restraint" on protected speech, because that court required the submission of certain casino advertising to appellee for its prior approval. See *post*, at 3. This argument was not raised by appellant either below or in this Court, and we therefore express no view on the constitutionality of the particular portion of the Superior Court's narrowing construction cited by JUSTICE STEVENS.

SUPREME COURT OF THE UNITED STATES

No. 84–1903

POSADAS DE PUERTO RICO ASSOCIATES, DBA CONDADO HOLIDAY INN, APPELLANT *v.* TOURISM COMPANY OF PUERTO RICO

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

[July 1, 1986]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

The Puerto Rico Games of Chance Act of 1948, Act 221 of May 15, 1948, legalizes certain forms of casino gambling in Puerto Rico. Section 8 of the Act nevertheless prohibits gambling casinos from "advertis[ing] or otherwise offer[ing] their facilities to the public of Puerto Rico." § 8, codified, as amended, at P. R. Laws Ann., Tit. 15, § 77 (1972). Because neither the language of § 8 nor the applicable regulations define what constitutes "advertis[ing] or otherwise offer[ing gambling] facilities to the public of Puerto Rico," appellee Tourism Company was found to have applied the Act in an arbitrary and confusing manner. To ameliorate this problem, the Puerto Rico Superior Court, to avoid a declaration of the unconstitutionality of § 8, construed it to ban only advertisements or offerings directed to the residents of Puerto Rico, and listed examples of the kinds of advertisements that the court considered permissible under the Act. I doubt that this interpretation will assure that arbitrary and unreasonable applications of § 8 will no longer occur.[1] However,

[1] Beyond the specific areas addressed by the Superior Court's "guidelines," § 8 must still be applied on a case-by-case basis; a casino advertisement "passes legal scrutiny" if "the object of the advertisement is the tourist." App. to Juris. statement 40b. Appellee continues to insist that a newspaper photograph of appellant's slot machines constituted an imper-

even assuming that appellee will now enforce §8 in a non-arbitrary manner, I do not believe that Puerto Rico constitutionally may suppress truthful commercial speech in order to discourage its residents from engaging in lawful activity.

I

It is well settled that the First Amendment protects commercial speech from unwarranted governmental regulation. See *Virginia Pharmacy Board* v. *Virginia Citizens Consumer Council, Inc.* 425 U. S. 748, 761–762 (1976). "Commercial expression not only serves the economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information." *Central Hudson Gas & Electric Corp.* v. *Public Service Comm'n*, 447 U. S. 557, 561–562 (1980). Our decisions have recognized, however, "the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech." *Ohralik* v. *Ohio State Bar Assn.*, 436 U. S. 447, 455–456 (1978). We have therefore held that the Constitution "accords less protection to commercial speech than to other constitutionally safeguarded forms of expression." *Bolger* v. *Youngs Drug Products Corp.*, 463 U. S. 60, 64–65 (1983). Thus, while the First Amendment ordinarily prohibits regulation of speech based on the content of the communicated message, the government may regulate the content of commercial speech in order to prevent the dissemination of information that is false, deceptive, or misleading, see *Zauderer* v. *Office of Disciplinary Counsel*, 471 U. S. ——, —— (1985); *Friedman* v. *Rogers*,

missible "advertisement," even though it was taken at a press conference called to protest legislative action. See Brief for Appellees 48. Thus, even under the narrowing construction made by the Superior Court, appellee would interpret §8 to prohibit casino owners from criticizing governmental policy concerning casino gambling if such speech is directed to the Puerto Rico residents who elect government officials, rather than to tourists.

440 U. S. 1, 14–15 (1979); *Ohralik*, *supra*, at 462, or that proposes an illegal transaction, see *Pittsburgh Press Co.* v. *Human Relations Comm'n*, 413 U. S. 376 (1973). We have, however, consistently invalidated restrictions designed to deprive consumers of accurate information about products and services legally offered for sale. See *e. g.*, *Bates* v. *State Bar of Arizona*, 433 U. S. 350 (1977) (lawyer's services); *Carey* v. *Population Services International*, 431 U. S. 678, 700–702 (1977) (contraceptives); *Linmark Associates, Inc.* v. *Willingboro*, 431 U. S. 85 (1977) (housing); *Virginia Pharmacy Board*, *supra* (pharmaceuticals); *Bigelow* v. *Virginia*, 421 U. S. 809 (1975) (abortions).

I see no reason why commercial speech should be afforded less protection than other types of speech where, as here, the government seeks to suppress commercial speech in order to deprive consumers of accurate information concerning lawful activity. Commercial speech is considered to be different from other kinds of protected expression because advertisers are particularly well suited to evaluate "the accuracy of their messages and the lawfulness of the underlying activity," *Central Hudson*, *supra*, at 564, n. 6, and because "commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not 'particularly susceptible to being crushed by overbroad regulation.'" *Ibid.* (quoting *Bates*, *supra*, at 381); see also *Friedman*, *supra*, at 10; *Virginia Pharmacy Board*, *supra*, at 772, n. 24. These differences, we have held, "justify a more permissive approach to regulation of the manner of commercial speech for the purpose of protecting consumers from deception or coercion, and these differences explain why doctrines designed to prevent 'chilling' of protected speech are inapplicable to commercial speech." *Central Hudson*, *supra*, at 578 (BLACKMUN, J., concurring in judgment); see *Linmark Associates, Inc.*, *supra*, at 93; *Virginia Pharmacy Board*, *supra*, at 772, n. 24. However, no differences between commercial and other kinds of speech justify protecting commercial speech less

extensively where, as here, the government seeks to manipulate private behavior by depriving citizens of truthful information concerning lawful activities.

> "Even though 'commercial' speech is involved, [this kind of restriction] strikes at the heart of the First Amendment. This is because it is a covert attempt by the State to manipulate the choices of its citizens, not by persuasion or direct regulation, but by depriving the public of the information needed to make a free choice. . . . [T]he State's policy choices are insulated from the visibility and scrutiny that direct regulation would entail and the conduct of citizens is molded by the information that government chooses to give them. . . ." *Central Hudson*, *supra*, at 574–575 (BLACKMUN, J., concurring in judgment).

See also Note, Constitutional Protection of Commercial Speech, 82 Colum. L. Rev. 720, 750 (1982) ("Regulation of commercial speech designed to influence behavior by depriving citizens of information . . . violates basic [First Amendment] principles of viewpoint- and public-agenda-neutrality"). Accordingly, I believe that where the government seeks to suppress the dissemination of nonmisleading commercial speech relating to legal activities, for fear that recipients will act on the information provided, such regulation should be subject to strict judicial scrutiny.

II

The Court, rather than applying strict scrutiny, evaluates Puerto Rico's advertising ban under the relaxed standards normally used to test government regulation of commercial speech. Even under these standards, however, I do not believe that Puerto Rico constitutionally may suppress all casino advertising directed to its residents. The Court correctly recognizes that "[t]he particular kind of commercial speech at issue here, namely, advertising of casino gambling aimed at the residents of Puerto Rico, concerns a lawful ac-

tivity and is not misleading or fraudulent." *Ante*, at ——. Under our commercial speech precedents, Puerto Rico constitutionally may restrict truthful speech concerning lawful activity only if its interest in doing so is substantial, if the restrictions directly advance the Commonwealth's asserted interest, and if the restrictions are no more extensive than necessary to advance that interest. See *Zauderer*, 471 U. S., at ——; *In re R. M. J.*, 455 U. S. 191, 203 (1982); *Central Hudson*, 447 U. S., at 564. While tipping its hat to these standards, the Court does little more than defer to what it perceives to be the determination by Puerto Rico's legislature that a ban on casino advertising aimed at residents is reasonable. The Court totally ignores the fact that commercial speech is entitled to substantial First Amendment protection, giving the government unprecedented authority to eviscerate constitutionally protected expression.

A

The Court asserts that the Commonwealth has a legitimate and substantial interest in discouraging its residents from engaging in casino gambling. According to the Court, the legislature believed that "'[e]xcessive casino gambling among local residents . . . would produce serious harmful effects on the health, safety and welfare of the Puerto Rican citizens, such as the disruption of moral and cultural patterns, the increase in local crime, the fostering of prostitution, the development of corruption, and the infiltration of organized crime.'" *Ante*, at —— (quoting Brief of Appellees 37). Neither the statute on its face nor the legislative history indicates that the Puerto Rico Legislature thought that serious harm would result if residents were allowed to engage in casino gambling;[2] indeed, the available evidence suggests

[2] The Act's Statement of Motives says only that: "The purpose of this Act is to contribute to the development of tourism by means of the authorization of certain games of chance . . . and by the establishment of regulations for and the strict surveillance of said games by the government, in order to ensure for tourists the best possible safeguards, while at the same

exactly the opposite. Puerto Rico has legalized gambling casinos, and permits its residents to patronize them. Thus, the Puerto Rico legislature has determined that permitting residents to engage in casino gambling will not produce the "serious harmful effects" that have led a majority of States to ban such activity. Residents of Puerto Rico are also permitted to engage in a variety of other gambling activites—including horse racing, "picas", dog racing, cockfighting, and the Puerto Rico lottery—all of which are allowed to advertise freely to residents.[3] Indeed, it is surely not far-fetched to suppose that the legislature chose to restrict casino advertising not because of the "evils" of casino gambling, but because

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time opening for the Treasurer of Puerto Rico an additional source of income." Games of Chance Act of 1948, Act 221 of May 15, 1948, § 1. There is no suggestion that discouraging residents from patronizing gambling casinos would further Puerto Rico's interests in developing tourism, ensuring safeguards for tourists, or producing additional revenue.

[3] The Court seeks to justify Puerto Rico's selective prohibition of casino advertising by asserting that "the legislature felt that for Puerto Ricans the risks associated with casino gambling were significantly greater than those associated with the more traditional kinds of gambling in Puerto Rico." *Ante*, at ——. Nothing in the record suggests that the legislature believed this to be the case. Appellee has failed to show that casino gambling presents risks different from those associated with other gambling activities, such that Puerto Rico might, consistently with the First Amendment, choose to suppress only casino advertising directed to its residents. Cf. *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 534, n. 12 (1981) (BRENNAN, J., concurring in judgment) (The First Amendment "demands more than a rational basis for preferring one kind of commercial speech over another"); *Schad* v. *Mount Ephraim*, 452 U. S. 61, 73 (1981) ("[t]he [government] has presented no evidence, and it is not immediately apparent as a matter of experience, that live entertainment poses problems . . . more significant that those associated with various permitted uses"). For this reason, I believe that Puerto Rico's selective advertising ban also violates appellant's rights under the Equal Protection Clause. In rejecting appellant's equal protection claim, the Court erroneously uses a "rational basis" analysis, thereby ignoring the important First Amendment interests implicated by this case. Cf. *Police Dept. of Chicago* v. *Mosley*, 408 U. S. 92 (1972).

it preferred that Puerto Ricans spend their gambling dollars on the Puerto Rico lottery. In any event, in light of the legislature's determination that serious harm will *not* result if residents are permitted and *encouraged* to gamble, I do not see how Puerto Rico's interest in discouraging its residents from engaging in casino gambling can be characterized as "substantial," even if the legislature had actually asserted such an interest which, of course, it has not. Cf. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U. S. 691, 715 (1984) (Oklahoma's selective regulation of liquor advertising "suggests limits on the substantiality of the interests it asserts"); *Metromedia, Inc.* v. *San Diego*, 453 U. S. 490, 532 (1981) (BRENNAN, J., concurring in judgment) ("if billboards alone are banned and no further steps are contemplated or likely, the commitment of the city to improving its physical environment is placed in doubt").

The Court nevertheless sustains Puerto Rico's advertising ban because the legislature *could* have determined that casino gambling would seriously harm the health, safety, and welfare of the Puerto Rican citizens. *Ante*, at ——.[4] This reasoning is contrary to this Court's long established First Amendment jurisprudence. When the government seeks to

[4]The Court reasons that because Puerto Rico could legitimately decide to prohibit casino gambling entirely, it may also take the "less intrusive step" of legalizing casino gambling but restricting speech. *Ante*, at ——. According to the Court, it would "surely be a strange constitutional doctine which would concede to the legislature the authority to totally ban [casino gambling] but deny to the legislature the authority to forbid the stimulation of demand for [casino gambling]" by banning advertising. *Ibid.* I do not agree that a ban on casino advertising is "less intrusive" than an outright prohibition of such activity. A majority of States have chosen not to legalize casino gambling, and we have never suggested that this might be unconstitutional. However, having decided to legalize casino gambling, Puerto Rico's decision to ban truthful speech concerning entirely lawful activity raises serious First Amendment problems. Thus, the "constitutional doctrine" which bans Puerto Rico from banning advertisements concerning lawful casino gambling is not so strange a restraint—it is called the First Amendment.

place restrictions upon commercial speech, a court may not, as the Court implies today, simply speculate about valid reasons that the government might have for enacting such restrictions. Rather, the government ultimately bears the burden of justifying the challenged regulation, and it is incumbent upon the government to *prove* that the interests it seeks to further are real and substantial. See *Zauderer*, 471 U. S., at ——; *In re R. M. J.*, 455 U. S., at 205–206; *Friedman*, 440 U. S., at 15. In this case, appellee has not shown that "serious harmful effects" will result if Puerto Rico residents gamble in casinos, and the legislature's decision to legalize such activity suggests that it believed the opposite to be true. In short, appellees have failed to show that a substantial government interest supports Puerto Rico's ban on protected expression.

B

Even assuming that appellee could show that the challenged restrictions are supported by a substantial governmental interest, this would not end the inquiry into their constitutionality. See *Linmark Associates*, 431 U. S., at 94; *Virginia Pharmacy Board*, 425 U. S., at 766. Appellee must still demonstrate that the challenged advertising ban directly advances Puerto Rico's interest in controlling the harmful effects allegedly associated with casino gambling. *Central Hudson*, 447 U. S., at 564. The Court proclaims that Puerto Rico's legislature "obviously believed . . . that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised." *Ante*, at ——. However, even assuming that an advertising ban would effectively reduce residents' patronage of gambling casinos,[5] it is not clear how it would

[5] Unlike the Court, I do not read the fact that appellant has chosen to litigate the case here necessarily to indicate the appellant itself believes that Puerto Rico residents would respond to casino advertising. In light of appellee's arbitrary and capricious application of § 8, appellant could justifiably have believed that, notwithstanding the Superior Court's

directly advance Puerto Rico's interest in controlling the "serious harmful effects" the Court associates with casino gambling. In particular, it is unclear whether banning casino advertising aimed at residents would affect local crime, prostitution, the development of corruption, or the infiltration of organized crime. Because Puerto Rico actively promotes its casinos to tourists, these problems are likely to persist whether or not residents are also encouraged to gamble. Absent some showing that a ban on advertising aimed only at residents will directly advance Puerto Rico's interest in controlling the harmful effects allegedly associated with casino gambling, Puerto Rico may not constitutionally restrict protected expression in that way.

C

Finally, appellee has failed to show that Puerto Rico's interest in controlling the harmful effects allegedly associated with casino gambling "cannot be protected adequately by more limited regulation of appellant's commercial expression." *Central Hudson, supra*, at 570. Rather than suppressing constitutionally protected expression, Puerto Rico could seek directly to address the specific harms thought to be associated with casino gambling. Thus, Puerto Rico could continue carefully to monitor casino operations to guard against "the development of corruption, and the infiltration of organized crime." *Ante*, at ——. It could vigorously enforce its criminal statutes to combat "the increase in local crime [and] the fostering of prostitution." *Ibid.* It could establish limits on the level of permissible betting, or promulgate additional speech designed to discourage casino gambling among residents, in order to avoid the "disruption of moral and cultural patterns," *ibid.*, that might result if residents were to engage in excessive casino gambling. Such measures would directly address the problems appellee asso-

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"narrowing" constuction, its First Amendment rights could be safeguarded effectively only if the Act was invalidated on its face.

ciates with casino gambling, while avoiding the First Amendment problems raised where the government seeks to ban constitutionally protected speech.

The Court fails even to acknowledge the wide range of effective alternatives available to Puerto Rico, and addresses only appellant's claim that Puerto Rico's legislature might choose to reduce the demand for casino gambling among residents by "promulgating additional speech designed to discourage it." *Ante*, at ——. The Court rejects this alternative, asserting that "it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising." *Ibid.* This reasoning ignores the commands of the First Amendment. Where the government seeks to restrict speech in order to advance an important interest, it is not, contrary to what the Court has stated, "up to the legislature" to decide whether or not the government's interest might be protected adequately by less intrusive measures. Rather, it is incumbent upon the government to *prove* that more limited means are not sufficient to protect its interests, and for a *court* to decide whether or not the government has sustained this burden. See *In re R. M. J.*, 455 U. S., at 206; *Central Hudson*, *supra*, at 571. In this case, nothing suggests that the Puerto Rico Legislature ever considered the efficacy of measures other than suppressing protected expression. More importantly, there has been no showing that alternative measures would inadequately safeguard the Commonwealth's interest in controlling the harmful effects allegedly associated with casino gambling. Under these circumstances, Puerto Rico's ban on advertising clearly violates the First Amendment.[6]

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[6]The Court seeks to buttress its holding by noting that some States have regulated other "harmful" products, such as cigarettes, alcoholic beverages, and legalized prostitution, by restricting advertising. While I believe that Puerto Rico may not prohibit all casino advertising directed to

The Court believes that Puerto Rico constitutionally may prevent its residents from obtaining truthful commercial speech concerning otherwise lawful activity because of the effect it fears this information will have. However, "[i]t is precisely this kind of choice between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Virginia Pharmacy Board*, 425 U. S., at 770. "[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *First National Bank* v. *Bellotti*, 435 U. S. 765, 791 (1978). The First Amendment presupposes that "people will perceive their own best interests if only they are well enough informed, and . . . the best means to that end is to open the channels of communication, rather than to close them. . . ." *Virginia Pharmacy Board, supra*, at 770. "[I]f there be any danger that the people cannot evaluate . . . information . . . it is a danger contemplated by the Framers of the First Amendment." *Bellotti, supra*, at 792; see also *Central Hudson*, 447 U. S., at 562 ("the First Amendment presumes that some accurate information is better than no information at all"). Accordingly, I would hold that Puerto Rico may not suppress the dissemination of truthful information about entirely lawful activity merely to keep its residents ignorant. The Court, however, would allow Puerto Rico to do just that, thus dramatically shrinking the scope of First Amendment protection available to commercial speech, and giving government officials unprecedented authority to eviscerate constitutionally protected expression. I respectfully dissent.

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its residents, I reserve judgment as to the constitutionality of the variety of advertising restrictions adopted by other jurisdictions.

SUPREME COURT OF THE UNITED STATES

No. 84–1903

POSADAS DE PUERTO RICO ASSOCIATES, DBA CONDADO HOLIDAY INN, APPELLANT *v.* TOURISM COMPANY OF PUERTO RICO

ON APPEAL FROM THE SUPREME COURT OF PUERTO RICO

[July 1, 1986]

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, dissenting.

The Court concludes that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling." *Ante*, at 16. Whether a State may ban all advertising of an activity that it permits but could prohibit—such as gambling, prostitution, or the consumption of marijuana or liquor—is an elegant question of constitutional law. It is not, however, appropriate to address that question in this case because Puerto Rico's rather bizarre restraints on speech are so plainly forbidden by the First Amendment.

Puerto Rico does not simply "ban advertising of casino gambling." Rather, Puerto Rico blatantly discriminates in its punishment of speech depending on the publication, audience, and words employed. Moreover, the prohibitions, as now construed by the Puerto Rico courts, establish a regime of prior restraint and articulate a standard that is hopelessly vague and unpredictable.

With respect to the publisher, in stark, unabashed language, the Superior Court's construction favors certain identifiable publications and disfavors others. If the publication (or medium) is from outside Puerto Rico, it is very favored indeed. "Within the ads of casinos allowed by this regulation figure . . . movies, television, radio, newspapers, and

trade magazines which may be published, taped, or filmed in the exterior for tourism promotion in the exterior even though they may be exposed or incidentally circulated in Puerto Rico. For example: an advertisement in the New York Times, an advertisement in CBS which reaches us through Cable TV, whose main objective is to reach the potential tourist." App. to Juris. Statement 38b–39b. If the publication is native to Puerto Rico, however—the San Juan Star, for instance—it is subject to a far more rigid system of restraints and controls regarding the manner in which a certain form of speech (casino ads) may be carried in its pages. Unless the Court is prepared to uphold an Illinois regulation of speech that subjects The New York Times to one standard and The Chicago Tribune to another, I do not understand why it is willing to uphold a Puerto Rico regulation that applies one standard to The New York Times and another to the San Juan Star.

With respect to the audience, the newly construed regulations plainly discriminate in terms of the intended listener or reader. Casino advertising must be "addressed to tourists." *Id.*, at 38b. It must not "invite the residents of Puerto Rico to visit the casino." *Ibid.* The regulation thus poses what might be viewed as a reverse Privileges and Immunities problem: Puerto Rico's residents are singled out for disfavored treatment in comparison to all other Americans.[1] But nothing so fancy is required to recognize the obvious First Amendment problem in this kind of audience discrimination. I cannot imagine that this Court would uphold an Illinois regulation that forbade advertising "addressed" to Illinois residents while allowing the same advertiser to communicate

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[1] Perhaps, since Puerto Rico somewhat ambivalently regards a gambling casino as a good thing for the local proprietor and an evil for the local patrons, the ban on local advertising might be viewed as a form of protection against the poison that Puerto Rico uses to attract strangers into its web. If too much speech about the poison were permitted, local residents might not only partake of it but also decide to prohibit it.

his message to visitors and commuters; we should be no more willing to uphold a Puerto Rico regulation that forbids advertising "addressed" to Puerto Rico residents.

With respect to the message, the regulations now take one word of the English language—"casino"—and give it a special opprobrium. Use of that suspicious six letter word is permitted only "where the trade name of the hotel is used even though it may contain a reference to the casino." *Id.*, at 39b. The regulations explicitly include an important provision—"that the word casino is never used alone nor specified." *Ibid.* (The meaning of "specified"—perhaps italicization, or boldface, or all capital letters—is presumably left to subsequent case-by-case adjudication). Singling out the use of a particular word for official sanctions raises grave First Amendment concerns, and Puerto Rico has utterly failed to justify the disfavor in which that particular six-letter word is held.

With respect to prior restraint, the Superior Court's opinion establishes a regime of censorship. In a section of the opinion that the majority fails to include, *ante*, at 5, the court explained:

> "We hereby authorize the publicity of the casinos in newspapers, magazines, radio, television or any other publicity media, of our games of change in the exterior *with the previous approval of the Tourism Company* regarding the text of said ad, which must be submitted in draft to the Company. Provided, however, that no photographs, or pictures may be approval of the Company." App. to Juris. Statement 38b (emphasis added).

A more obvious form of prior restraint is difficult to imagine.

With respect to vagueness, the Superior Court's construction yields no certain or predictable standards for Puerto Rico's suppression of particular kinds of speech. Part of the problem lies in the delineation of permitted speech in terms of the audience to which it is addressed. The Puerto Rico Court stated that casino ads within Puerto Rico are permissi-

ble "provided they do not invite the residents of Puerto Rico to visit the casino, even though such announcements may incidentally reach the hands of a resident." *Id.*, at 38b. At oral argument, Puerto Rico's counsel stated that a casino advertisement in a publication with 95% local circulation—perhaps the San Juan Star—might actually be permissible, so long as the advertisement "is addressed to tourists and not to residents." Tr. of Oral Arg. 26. Then again, maybe not. Maybe such an ad would not be permissible, and maybe there would be considerable uncertainty about the nature of the required "address." For the Puerto Rico Court was not particularly concerned with the precise limits of the oddly selective ban on public speech that it was announcing. The Court noted: "Since a *clausus* enumeration of this regulation is unforeseeable, any other situation or incident relating to the legal restriction must be measured in light of the public policy of promoting tourism." App. to Juris. Statement 40b. And in a passage that should chill, not only would-be speakers, but reviewing courts as well, the Superior Court expressly noted that there was nothing immutable about its supposedly limiting and saving construction of the restraints on speech: "These guide-regulations may be amended in the future by the enforcing agency pursuant to the dictates of the changing needs and in accordance with the law and what is resolved herein." *Id.*, at 42b.[2]

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[2] The unpredictable character of the censorship envisioned by the Superior Court is perhaps illustrated by its decision, apparently *sua sponte*, Tr. of Oral Arg. 43, to invalidate a regulation that required male patrons of casinos to wear dinner jackets. See *ante*, at 7, n. 4. The Superior Court explained:

"The classification that we do find suspicious, and which came to our attention during the course of this cause of action, *ACAA* v. *Enrique Bird Pinero*, C. A. 1984 Number 46, is the one made in section 4(e) of the Gaming Regulation (15 R. R. P. R. Sec. 76–a4[e]) requiring that the male tourist wear a jacket within the casino. On one hand, Puerto Rico is a tropical country. Adequate informal wear, such as the guayabera, is in tune with our climate and allows the tourist to enjoy himself without extreme, and in

The general proposition advanced by the majority today—that a State may prohibit the advertising of permitted conduct if it may prohibit the conduct altogether—bears little resemblance to the grotesquely flawed regulation of speech advanced by Puerto Rico in this case.[3] The First Amendment surely does not permit Puerto Rico's frank discrimination among publications, audiences, and words. Nor should sanctions for speech be as unpredictable and haphazardous as the roll of dice in a casino.

I respectfully dissent.

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our judgment unconstitutional, restrictions on his stay on the Island. On the other hand, said requirement does not improve at all the elegant atmosphere that prevails in our casinos, since the male player may be forced to wear a horribly sewn jacket, so prepared to prevent people from taking them, which to a certain point is degrading for the man and discriminatory, since women are allowed into the casino without any type of requirement for formal wear. The Honorable Supreme Court in *Figueroa Ferrer*, *supra*, stated: 'parliaments are not the only necessary agents of social change' and 'when you try to maintain a constitutional scheme alive, to preserve it in harmony with the realities of a country, the court's principal duty is to legislate towards that end, with the tranquility and circumspection which its role within our governmental system demands, without exceeding the framework of its jurisdiction.' To save the constitutionality of the Law under our consideration, we must bend the requirement of formal wear since this is basically a condition of sex and the State has no reasonable interest which would warrant a dissimilar classification." App. to Juris. Statement at 35b–36b.

Apparently, the Superior Court felt that Puerto Rico's unique brand of local censorship, like the guayabera, was "in tune" with Puerto Rico's climate; it is the obligation of this Court, however, to evaluate the regulations from a more universal perspective.

[3] Moreover, the Court has relied on an inappropriate major premise. The fact that Puerto Rico might prohibit all casino gambling does not necessarily mean that it could prohibit residents from patronizing casinos that are open to tourists. Even under the Court's reasoning, discriminatory censorship cannot be justified as a less restrictive form of economic regulation unless discriminatory regulation is itself permissible.

986/84-1904

(Slip Opinion)

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SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS *v.* GALIOTO

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

No. 84–1904. Argued March 26, 1986—Decided June 27, 1986

Appellee, who had been involuntarily committed to a mental hospital for a period of several weeks in 1971, was unable to purchase a firearm from a store in 1982 because of the provisions of 18 U. S. C. § 922(d) prohibiting sales of firearms to such persons. Section 922(d) and other federal statutes prohibiting persons who have been committed to mental institutions from possessing, receiving, or transporting firearms also apply to felons. However, under 18 U. S. C. § 925(c), certain felons could apply to the Bureau of Alcohol, Tobacco and Firearms for administrative relief from the disabilities imposed by federal firearms laws, but no such relief was permitted for former mental patients. After unsuccessfully seeking a special exemption from the Bureau, appellee brought suit in Federal District Court, challenging the constitutionality of the firearms legislation. The court held that the statutory scheme was unconstitutional as violating equal protection principles because there was no rational basis for singling out mental patients for permanent disabled status, particularly as compared to convicts. The court also concluded that the statutory scheme unconstitutionally created an "irrebuttable presumption" that one who has been committed, no matter what the circumstances, is forever mentally ill and dangerous.

Held: The equal protection and "irrebuttable presumption" issues are now moot because, after this Court noted probable jurisdiction over this appeal and heard arguments, Congress amended § 925(c) to afford the administrative remedy contained therein to former mental patients ineligible to purchase firearms. Since appellee's complaint appears to raise

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Syllabus

other issues best addressed in the first instance by the District Court, the case is remanded for further proceedings. Pp. 3–4.

602 F. Supp. 682, vacated and remanded.

BURGER, C. J., delivered the opinion for a unanimous Court.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 84–1904

UNITED STATES DEPARTMENT OF THE TREASURY, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, APPELLANT *v.* ANTHONY J. GALIOTO

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

[June 27, 1986]

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We noted probable jurisdiction to decide whether Congress may, consistent with the Fifth Amendment, forbid all involuntarily committed former mental patients to purchase firearms while permitting some felons to do so.

In 1982 appellee attempted to purchase a firearm at Ray's Sport Shop in North Plainfield, New Jersey. The sport shop gave appellee a standard questionnaire, which asked *inter alia*: "Have you ever been adjudicated mentally defective or have you ever been committed to a mental institution?" Appellee had been involuntarily committed to a mental hospital for a period of several weeks in 1971, and accordingly answered "yes" to this question. The store then refused to sell him a gun by reason of 18 U. S. C. § 922(d)(4), which makes it unlawful for a licensed dealer in firearms "to sell . . . any firearm . . . to any person knowing or having reasonable cause to believe that such person . . . has been adjudicated as a mental defective or had been committed to any mental institution." Federal firearms laws also forbid "any person . . . who has been adjudicated as a mental defective or who has been committed to a mental institution . . . to ship or transport any firearm or ammunition in interstate or foreign com-

merce," 18 U. S. C. § 922(g), or to "receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce," § 922(h). Partially overlapping provisions of 18 U. S. C. App. §§ 1202(a)(1) and (3) prohibit any person who has "been adjudged by a court . . . of being mentally incompetent" from receiving, possessing or transporting firearms.

After unsuccessfully seeking a special exemption from the Bureau of Alcohol, Tobacco, and Firearms, appellee brought suit in the United States District Court for the District of New Jersey, challenging the constitutionality of the firearms legislation. The District Court concluded that those portions of the federal firearms statutes that deprived appellee of his ability to purchase a firearm were constitutionally infirm. 602 F. Supp. 682, 683 (1985). Both felons and persons who have been committed to mental institutions, *inter alia*, are subject to the firearms disabilities contained in 18 U. S. C. § 922(d). Under 18 U. S. C. § 925(c), however, felons who have committed crimes not involving firearms may apply to the Bureau for administrative relief from these disabilities. No such relief is permitted for former mental patients.

Section 925(c) provides in relevant part:

"A person who has been convicted for a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) may make application to the Secretary for relief from the disabilities imposed by Federal laws with respect to the acquisition, receipt, transfer, shipment, or possession of firearms and incurred by reason of such conviction, and the Secretary may grant such relief if it is established to his satisfaction that the circumstances regarding the conviction, and the applicant's record and reputation, are such that the applicant will not be likely to act in a manner dangerous to public

safety and that the granting of the relief would not be contrary to the public interest."

The District Court held that this scheme violated equal protection principles because, in its view, "[t]here is no rational basis for thus singling out mental patients for permanent disabled status, particularly as compared to convicts." 602 F. Supp., at 689. The court also concluded that the statutory scheme was unconstitutional because it "in effect creates an irrebuttable presumption that one who has been committed, no matter the circumstances, is forever mentally ill and dangerous." *Id.*, at 690. We noted probable jurisdiction over the Government's appeal, and the case was argued on March 26, 1986.

Meanwhile, Congress came to the conclusion, as a matter of legislative policy, that the firearms statutes should be redrafted. On May 19, 1986, while this case was under consideration here, the President signed into law Pub. L. 99–308, 100 Stat. 449. Section 105 of the statute amends the provision providing for administrative relief from firearms disabilities, 18 U. S. C. § 925(c), by striking out the language limiting the provision to certain felons and changing the statute to read that any person who "is prohibited from possessing, shipping, transporting, or receiving firearms or ammunition" may apply to the Secretary of the Treasury for relief. Section 110 of the statute provides that the amendment made by § 105 "shall be applicable to any action, petition, or appellate proceeding pending on the date of the enactment of this Act."

This enactment significantly alters the posture of this case. The new statutory scheme permits the Secretary to grant relief in some circumstances to former involuntarily committed mental patients such as appellee. The new approach affords an administrative remedy to former mental patients like that Congress provided for others *prima facie* ineligible to purchase firearms. Thus, it can no longer be contended that such persons have been "singled out." Also, no "irrebuttable presumption" now exists since a hearing is afforded to

anyone subject to firearms disabilities. Accordingly, the equal protection and "irrebuttable presumption" issues discussed by the District Court are now moot. See *United Building and Construction Trades Council of Camden County and Vicinity* v. *Mayor and Council of Camden*, 465 U. S. 208, 213 (1984).

In such circumstances, "it is the duty of the appellate court to set aside the decree below . . . ." *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 267 (1936); see also *United States* v. *Munsingwear, Inc.*, 340 U. S. 36, 39–40 (1950). We therefore vacate the judgment of the District Court. However, since appellee's complaint appears to raise other issues best addressed in the first instance by the District Court, we also remand the case for further proceedings consistent with this opinion.

Vacated and remanded.

986/84-1905

(Slip Opinion)

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SUPREME COURT OF THE UNITED STATES

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BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES *v.* OWENS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 84–1905. Argued February 26, 1986—Decided May 19, 1986

Certain provisions of the Social Security Act in effect between 1979 and 1983 authorized payment of survivor's benefits to a wage earner's widowed spouse who remarried after age 60 but not to a similarly situated divorced widowed spouse. After being administratively denied survivor's benefits under these provisions because she had remarried, appellee divorced widow filed a class action in Federal District Court, challenging the constitutionality of the provisions. The court upheld the challenge, reasoning that because Congress in 1977 had chosen to treat surviving divorced spouses and widowed spouses in the same manner upon the wage earner's death, there was no logical basis for distinguishing between the two classes of individuals upon their subsequent remarriage.

Held: The provisions in question did not violate the equal protection component of the Due Process Clause of the Fifth Amendment. Pp. 5–10.

(a) When Congress decided to create some exceptions to the rule under which widowed spouses would lose their entitlement to survivor's benefits upon remarriage, it was not required to take an all-or-nothing approach but instead had valid reasons for proceeding more cautiously. Faced with concerns about the increase in the benefits that would ensue if the remarriage rule were completely eliminated, Congress reasonably could decide to concentrate limited funds where the need was likely to be greatest. Pp. 6–8.

(b) Because divorced widowed spouses did not enter into remarriage with the same level of dependency on the wage earner's account as widows or widowers, it was rational for Congress to treat these groups differently after remarriage. Any inference that because both divorced widowed spouses and widowed spouses were entitled to survivor's bene-

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Syllabus

fits, Congress viewed the groups as equally dependent on the wage earner, is belied by the history and provisions of the Act. Pp. 8–10.

Reversed and remanded.

POWELL, J., delivered the opinion of the Court, in which BURGER, C. J., and WHITE, REHNQUIST, STEVENS, and O'CONNOR, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, J., joined. BLACKMUN, J., filed a dissenting opinion.

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SUPREME COURT OF THE UNITED STATES

No. 84–1905

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT *v.* BUENTA M. OWENS ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

[May 19, 1986]

JUSTICE POWELL delivered the opinion of the Court.

Certain provisions of the Social Security Act in effect between 1979 and 1983 authorized payment of survivor's benefits from a wage earner's account to a widowed spouse who remarried after age 60, but not to a similarly situated divorced widowed spouse. The question in this case is whether those provisions violated the equal protection component of the Due Process Clause of the Fifth Amendment.

I

The Social Security Act (the Act) originally provided only primary benefits to qualified wage earners. Congress later provided secondary benefits to wives, widows, dependent children, and surviving parents of the wage earner. At that time, widows and other secondary beneficiaries would lose their entitlement to survivor's benefits upon a subsequent marriage. In 1950, Congress extended secondary benefits to dependent husbands and widowers, subject to the same restriction. In 1958, Congress created an exception to this remarriage rule so that if a widow or widower married an individual who received benefits under the Act, neither would forfeit survivor's benefits.

Until 1965, divorced wives, including those who had outlived their former spouse (divorced widows), were not eligi-

ble for the same benefits provided to wives and widows. In that year, Congress amended § 202(b) of the Act to extend wife's benefits to a divorced wife and survivor's benefits to a divorced widow if the recipient had been married to her former husband for at least 20 years, and had received more than one-half of her support from him or an agreement or court order required him to make substantial contributions to her support. Pub. L. 89–97, § 308(a), 79 Stat. 375–376.[1] Divorced wives and divorced widows were also subject to the same remarriage rule that had been applied to widows and widowers. In these amendments, however, Congress changed the remarriage rule as it applied to widows and widowers. The new rule provided that if a widow or widower over age 60 married someone who was not entitled to receive certain benefits under the Act, she or he would not completely forfeit survivor's benefits. Instead, the benefits were reduced to half of the primary wage earner's benefits. §§ 333(a)(1) and (b)(1), 79 Stat. 403, 404.

In 1977, Congress again relaxed the remarriage provision for widows and widowers, allowing them to receive unreduced survivor's benefits if they remarried after age 60. The effective date of that amendment was 1979. Pub. L. 95–216, §§ 336(a)(3), (b)(3), (c)(1), 91 Stat. 1547.[2] But Congress retained until 1983 the provision that generally barred a divorced wife or divorced widow from receiving benefits upon remarriage. See §§ 202(b)(1)(C), (b)(3), § 202(e)(1)(A), (e)(1)(F). The present case involves this temporary disparity in benefits received upon remarriage.

As a result of a pair of district court sex discrimination opinions that invalidated portions of the Act, *Ambrose* v.

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[1] In 1972, Congress eliminated the requirement that a divorced wife or divorced widow show a specified level of support from her former husband, but retained the 20-years-of-marriage requirement. Pub. L. 92–603, §§ 114(a), (b), 86 Stat. 1348.

[2] Congress also reduced the 20-years-of-marriage requirement for divorced wives and divorced widows to 10 years.

Califano, CCH Unempl. Ins. Rep. ¶17,702 (Ore. 1980); *Oliver* v. *Califano*, CCH Unempl. Ins. Rep. ¶15,244 (ND Cal. 1977), the Secretary of Health and Human Services (the Secretary) promulgated regulations providing that divorced husbands and divorced widowers would receive husband's benefits and survivor's benefits to the same extent as divorced wives and divorced widows received wife's benefits and survivor's benefits. 44 Fed. Reg. 34,480, 34,483–34,484 (1979); see 20 CFR §§404.331, 404.336 (1985). In 1983 Congress amended the Act to incorporate these regulatory changes. Pub. L. 98–21, §301(b)(1), 97 Stat. 111. In the same bill, Congress provided that divorced widowed spouses who remarry after age 60 are eligible to receive survivor's benefits in the same manner as widows and widowers.

II

Appellee Buenta Owens married Russell Judd in 1937 and was divorced from him in 1968. In 1978, when she was 61, she married appellee Kenneth Owens. Judd died on June 19, 1982. On July 30, 1982, Owens applied for widow's benefits on Judd's earnings account as a divorced widow. Her claim was denied on August 27, 1982, because she had remarried. She sought administrative reconsideration, contending that the statutory provision denying benefits because of her remarriage was unconstitutional. Her claim again was denied. Subsequently, Owens and the Secretary entered into an agreement stipulating that the only disputed issue was the constitutionality of the provisions of the Act that at that time denied widow's benefits to divorced widows who remarried. See 42 U. S. C. §§402(e)(1)(A), (e)(4). The parties also stipulated that, but for the relevant provisions, Owens' right to the benefits had been established. Based on that agreement, the parties waived any further administrative review. On April 19, 1983, Owens filed this action in the United States District Court for the Central District of California,

and sought to represent a nationwide class of divorced widowed spouses.[3]

On December 23, 1983, the District Court rejected Owens' constitutional challenge. Applying the rational basis standard of review, the court reasoned that Congress was justified in taking one step at a time in extending benefits to spouses who had remarried. While Owens' motion to alter or amend the judgment under Federal Rule of Civil Procedure 59 was pending, the 1983 amendments to the Act went into effect, so that all otherwise eligible members of the class became entitled to receive monthly survivor's benefits beginning in January 1984. Subsequently, the court certified a nationwide plaintiffs' class, consisting of all divorced widowed spouses who remarried after age 60 and who were denied benefits between December 1978 and January 1984.[4]

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[3] Appellee Kenneth Owens had been married to Dorothy L. Owens for over thirty-four years when they were divorced in 1978. In that same year he married Buenta Owens. He was sixty years old. In 1982 he applied for survivor's benefits based on the earnings account of his former wife, who had died. His claim was denied at the initial stage and again in a reconsideration decision in 1983. He and the Secretary also reached an agreement to waive any further administrative review. Kenneth Owens filed suit in the United States District Court for the Central District of California, challenging the constitutionality of the statutory provisions with an argument virtually identical to his wife's. When he filed his lawsuit, the District Court already had ruled in favor of the Secretary in Buenta Owens' suit, and her motion for reconsideration was pending. The court consolidated Kenneth Owens' suit with that of his wife. Kenneth Owens died during the pendency of this suit before this Court. Buenta Owens moved to be substituted for him as an appellee in this case, a motion we granted on February 24, 1985. Because appellees raise identical arguments, the discussion of Kenneth Owens' case is subsumed in the discussion of Buenta Owens' case.

[4] The Secretary disputes the propriety of the class certification and in particular the District Court's conclusion that the waiver of further administrative review as to the named appellees had the effect of waiving exhaustion requirements as to all the members of the class. Because we reject the equal protection claim, we do not reach the class certification issue.

On October 5, 1984, the District Court reversed its prior ruling on the merits and held the challenged provisions unconstitutional. The court agreed with the Secretary that Congress rationally could assume that widowed spouses are generally more dependent on income from the deceased wage earner than are divorced widowed spouses. It reasoned, however, that because Congress in 1977 had chosen to treat surviving divorced spouses and widowed spouses in the same manner upon the death of the wage earner, there was no logical basis for distinguishing between the two classes of individuals upon their subsequent remarriage. The Secretary appealed directly to this Court pursuant to 28 U. S. C. § 1252. We noted probable jurisdiction, *Heckler* v. *Owens*, 474 U. S. —— (1985). We now reverse.

III

Congress faces an unusually difficult task in providing for the distribution of benefits under the Social Security Act. The program is a massive one, and requires Congress to make many distinctions among classes of beneficiaries while making allocations from a finite fund. In that context, our review is deferential. "Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.'" *Mathews* v. *De Castro*, 429 U. S. 181, 185 (1976), quoting *Helvering* v. *Davis*, 301 U. S. 619, 640 (1937). As this Court explained in *Flemming* v. *Nestor*, 363 U. S. 603, 611 (1960):

> "Particularly when we deal with a withholding of a noncontractual benefit under a social welfare program such as [Social Security], we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute manifests a patently arbitrary classification, utterly lacking in rational justification."

When the challenged classification in this case is examined in the light of these principles, it cannot be said that the distinctions Congress made were arbitrary or irrational.

A

We have previously noted that "[t]he entitlement of any secondary beneficiary is predicated on his or her relationship to a contributing wage earner." *Califano* v. *Jobst*, 434 U. S. 47, 52 (1977). In determining who is eligible for such benefits, the scope of the program does not allow for "individualized proof on a case-by-case basis." *Ibid.* Congress "has elected to use simple criteria, such as age and marital status, to determine probable dependency." *Ibid.* In particular, Congress has used marital status as a general guide to dependency on the wage earner: "The idea that marriage changes dependency is expressed throughout the Social Security Act." *Id.*, at 52, n. 8. One example of this assumption is Congress' original decision to terminate the benefits of all secondary beneficiaries, including widowed spouses, who remarried.[5] When Congress subsequently made divorced widowed spouses eligible for survivor's benefits, it also imposed on them the rule that remarriage terminated benefits. This remarriage rule was based on the assumption that remarriage altered the status of dependency on the wage earner. This Court upheld the validity of that general assumption in *Jobst*. *Id.*, at 53.

Congress was not constitutionally obligated to continue to extend benefits to any remarried secondary beneficiary. It nevertheless chose to do so, but in gradual steps. In 1965, Congress provided that if a widow or widower remarried after age 60, she or he would receive reduced benefits. In 1977, Congress provided that if a widow or widower remar-

[5] In 1958, Congress amended this strict remarriage rule to provide that benefits would not be terminated if a widow or widower married a person who was also entitled to benefits under the Act. Pub. L. 85–840, §§ 307(b), (c), 72 Stat. 1031.

ried after age 60, she or he would continue to receive full survivor's benefits. Finally, in 1983, Congress amended the Act to provide that divorced widowed spouses who remarry after age 60 may receive survivor's benefits in the same manner as widows and widowers. Appellees complain that Congress' failure in 1977 to extend benefits to divorced widowed spouses who had remarried was irrational.

This Court consistently has recognized that in addressing complex problems a legislature "may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489 (1955). That is precisely what Congress has done in this case. When Congress decided to create some exceptions to the remarriage rule, it was not required to take an all-or-nothing approach. Instead, it chose to proceed more cautiously. It had valid reasons for doing so.

The House version of the 1977 bill contained a complete elimination of the general rule terminating benefits upon a subsequent marriage. H. R. Rep. No. 95–702, pt. 1, pp. 47–48 (1977). The House version would have created in the first year of operation alone 670,000 more beneficiaries than under the pre-1977 system,[6] costing $1.3 billion in additional benefits each year. *Ibid.*[7] Faced with these con-

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[6] In addition to widowed spouses and divorced widowed spouses, the expanded class of beneficiaries would have included surviving parents and surviving children.

[7] The contemporaneous legislative history does not reveal what portion of that figure would have been attributable to divorced widowed spouses. A budgetary report on the 1983 amendments that eliminated the distinction between widowed spouses and divorced widowed spouses estimated the cost of that amendment as less than $50 million a year. Congress in 1977 was not required to separate out the $1.3 billion cost figure by subcategories. It was free to continue to extend benefits following marriage only to that group of secondary beneficiaries most closely tied to the wage earner, consistent with the general purposes of the Act. That $50 million annual cost is sufficient to justify fiscal concern.

cerns, Congress reasonably could decide to "concentrate limited funds where the need [was] likely to be greatest." *Califano* v. *Boles*, 443 U. S. 282, 296 (1979). It chose only to create an exception for widows and widowers, who presumably were more likely to depend on their spouses for financial support than were divorced widows and widowers. While it may have been feasible to have extended benefits to divorced widowed spouses in 1979 rather than 1983, Congress was not constitutionally obligated to do so.

Congress' adjustments of this complex system of entitlements necessarily create distinctions among categories of beneficiaries, a result that could be avoided only by making sweeping changes in the Act instead of incremental ones. A constitutional rule that would invalidate Congress' attempts to proceed cautiously in awarding increased benefits might deter Congress from making any increases at all. The Due Process Clause does not impose any such "'constitutional straightjacket.'" *De Castro*, 429 U. S., at 185, quoting *Jefferson* v. *Hackney*, 406 U. S. 535, 546 (1972). As we recognized in *Jobst:*

> "Congress could reasonably take one firm step toward the goal of eliminating the hardship caused by the general marriage rule without accomplishing its entire objective in the same piece of legislation. *Williamson* v. *Lee Optical Co.*, 348 U. S. 483, 489. Even if it might have been wiser to take a larger step, the step Congress did take was in the right direction and had no adverse impact on persons like the Jobsts." *Califano* v. *Jobst*, 434 U. S., at 57–58.

Congress drew a reasonable line in a process that soon increased benefits to all relevant beneficiaries.

B

The District Court correctly reasoned that under *De Castro* and *Boles*, it was rational for Congress to assume that divorced widowed spouses are generally less dependent upon

the resources of their former spouses than are widows and widowers. It held, however, that because Congress had chosen to treat widowed spouses and divorced widowed spouses identically upon the death of the wage earner, there was no rational basis for distinguishing between them if they remarried. The logic of the District Court's position depends on a showing that Congress did not distinguish between divorced widowed spouses and widowed spouses prior to remarriage. Apparently the District Court inferred that because both divorced widowed spouses and widowed spouses were entitled to survivor's benefits, Congress viewed the groups as equally dependent on the wage earner. Such an inference is belied by the history and provisions of the Act.

When Congress first began to make divorced wives eligible for wive's benefits in 1965, it focused on that group of divorced wives whose marriages ended after many years, when they might be "too old to build up a substantial social security earnings record even if [they] can find a job." H. R. Rep. No. 213, 89th Cong., 1st Sess., 107–108 (1965). To that end, divorced wives were eligible for wife's benefits only if they had been married to the wage earner for 20 years and received substantial support from him. It was not until 1972 that Congress dropped the requirement of showing support from the wage earner. Even then, Congress retained the 20-year marriage requirement.

Congress has made the same distinctions in its treatment of divorced widowed spouses. When they first became eligible for survivor's benefits in 1965, it was under the same basic eligibility rules that applied to divorced spouses. During the relevant time of this lawsuit, divorced spouses and divorced widowed spouses had to have been married to the wage earner for at least 10 years to receive benefits. That pre-condition did not have to be met by spouses or widows.

These eligibility requirements demonstrate that Congress adhered to the general assumption, approved in *De Castro*,

that divorce normally reduces dependency on the wage earner. The fact that Congress awards benefits to divorced widowed spouses once the eligibility requirements are met does not necessarily mean that their dependency is equivalent to that of widows or widowers. Congress may view the 10-year-marriage requirement as a lesser showing of dependency, but still sufficient to justify extension of benefits. Presumably Congress concluded that remarriage sufficiently reduced that lesser dependency to the point where it could conclude that benefits no longer were appropriate. These views would be consistent with the position Congress has taken throughout the history of the Act that divorced spouses are less dependent on the wage earner than spouses. Because divorced widowed spouses did not enter into marriage with the same level of dependency on the wage earner's account as widows or widowers, it was rational for Congress to treat these groups differently after remarriage.

IV

The judgment of the District Court is reversed and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 84–1905

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT *v.* BUENTA M. OWENS ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

[May 19, 1986]

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The Court demonstrates an enviable ability to discern rationality where there is none. But the majority's efforts to imagine plausible legislative scenarios cannot obscure the simple truth: there is absolutely no evidence that Congress had any rational basis for deciding in 1977 that surviving divorced spouses who remarried could not receive the same survivor's benefits allowed to remarried widowed spouses. Because I believe that such a distinction between two groups treated similarly in other respects cannot survive the scrutiny required by the equal protection component of the Fifth Amendment's Due Process Clause, I dissent.

I

In 1977, a Report of the House Committee on Ways and Means noted one drawback of the benefits scheme then in force:

> "Present law provides, in general, that the marriage (or remarriage) of a worker's divorced or surviving spouse, parent, or child prevents or terminates entitlement to benefits based on the worker's social security earnings record. For example, a widow who remarries before age 60 cannot get benefits based on her first hus-

band's earnings as long as she is married. If she remarries after age 60, the benefits based on the first husband's social security are reduced or terminated; the widow gets either a wife's benefit based on her first husband's earnings (which is less than the widow's benefit she was getting) or a wife's benefit based on her current husband's earnings (if he is a beneficiary), whichever is higher. Benefits are not payable to divorced spouses and young surviving spouses who are remarried.

"Your committee is especially concerned about the effect of these provisions on older surviving spouses (and divorced spouses). Accordingly, your committee has recommended changes in the law which would eliminate marriage or remarriage as a factor affecting entitlement to benefits or benefit amounts. Specifically, under your committee's bill, marriage or remarriage would not bar or terminate entitlement to benefits as a divorced spouse, surviving spouse . . . , parent, or child, and remarriage would not cause any reduction in aged widow's or widower's insurance benefits." H. R. Rep. No. 95–702, pt. I, pp. 47–48 (1977).

The Senate version of this bill, however, did not address any of the House Committee's concerns. And a subsequent Report tersely records the result of discussions between conferees from both Houses on this issue:

> "The Senate recedes, with an amendment that would retain only that part of the House-passed provisions that would prevent reduction in benefits for widows and widowers who remarry after age 60." H. R. Conf. Rep. No. 95–837, p. 73 (1977).

The compromise thus produced the Social Security provisions in effect between 1979 and 1983 that are the subject of this suit. Those provisions authorized payment of survivor's benefits to widowed spouses who remarried after age 60, but not to similarly situated divorced widowed spouses.

II

As a historical matter, I suspect that the Court is right to characterize the distinction drawn by the 1977 Act between widowed spouses and surviving divorced spouses as the product of Congress' decision to "take one step at a time," *ante*, at ——, toward a program that would reflect "the needs of today's society," H. R. Rep. No. 95–702, pt. I, *supra*, at 4. However, under the Due Process Clause, even legislative classifications that result from compromise must bear at least a rational relationship to a legitimate state purpose. Had Congress accommodated the House's reform goals with the Senate's more conservative outlook in this area by passing a law giving benefits to only those remarried widowed spouses who had been born on odd-numbered days of the calendar, we would surely have to strike the provision down as irrational. The question here is thus whether Congress had any rational basis for taking the particular step that it chose to take in 1977.

Recognizing that it is not enough to label the 1977 provisions a way station on the road to a sensible destination, the Court argues that the statutory distinction between surviving divorced spouses and widowed spouses was based upon a legislative judgment that widowed spouses were the more dependent of the two groups. The problem with the majority's rationalization is that Congress never expressed it, or even hinted at it. The relevant legislative history contains absolutely no evidence to support the assumption that a divorced survivor is any less dependent than a widowed survivor, or to indicate that in 1977 Congress was at all motivated by that assumption.

The majority attempts to fill the gap by assuming that Congress must have perceived a distinction between divorced spouses and widowed spouses because it required that the former, but not the latter, be married to the wage earner for 10 years in order to receive benefits. That distinction can perhaps be taken as evidence that Congress believed that

a divorced spouse who had been married to the wage earner for less than 10 years was not sufficiently dependent on the wage earner's income to justify the extension of benefits. Yet it can hardly be taken as an indication that surviving divorced spouses who *did* satisfy the 10-year requirement were thought any less dependent than widowed spouses. Divorced spouses meeting that requirement were not treated differently from widowed spouses for any purpose other than the remarriage provisions, and there is no indication in the statute or legislative history that Congress ever attempted to articulate a difference between the two groups justifying different treatment.

"When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be presented not so much with a legislative policy choice as its absence." *Schweiker* v. *Wilson*, 450 U. S. 221, 244 (1981) (POWELL, J., dissenting); see *United States Railroad Retirement Board* v. *Fritz*, 449 U. S. 166, 184 (1980) (BRENNAN, J., dissenting). While the absence of a clear statement of purposes need not doom a statute under rationality review, our task must always be to determine whether a particular rational purpose *actually* motivated the Legislature. See *Fritz*, *supra*, at 188 (BRENNAN, J., dissenting). We have no indication in this case that Congress had any basis for drawing this line other than its desire to find a point of compromise between the two Houses. With the help of the Government's lawyers, the Court has tried hard to come up with a hypothetical justification for Congress' action. I do not think that is our job. I dissent.

SUPREME COURT OF THE UNITED STATES

No. 84–1905

OTIS R. BOWEN, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT *v.* BUENTA M. OWENS ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

[May 19, 1986]

JUSTICE BLACKMUN, dissenting.

I agree with JUSTICE MARSHALL that the Court has failed to identify a rational basis for Congress' decision to treat widowed spouses and surviving divorced spouses differently upon their remarriage. If anything, persons in these two categories are *more* similarly situated after remarriage than they were before, since they all then belong to family units unconnected to the primary wage earner whose earnings provide the basis for their secondary social security benefits. Cf. *Califano* v. *Jobst*, 434 U. S. 47, 53 (1977) ("marriage is an event which normally marks an important change in economic status" and "not only creates a new family . . . but also modifies . . . pre-existing relationships").